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## Note and Comment

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# MICHIGAN LAW REVIEW

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## NOTE AND COMMENT

THE "RIGHT" TO BREAK A CONTRACT.—It is common knowledge that the fully developed common law affords no means to compel the performance of a contract according to its terms. Does it follow from this that there is no legal obligation to perform a contract, or if obligation there be, that it is alternative: to perform or pay damages? A note in the XIV MICH. L. REV. 480 appears to give an affirmative answer to this question and at least one court (*Frye v. Hubbell*, 74 N. H. 358, at p. 374) has taken the same view. Probably the most forcible exposition of this position is given by Justice Holmes in his admirable address, "THE PATH OF THE LAW" (10 HARV. L. REV. at p. 462). The passage is sufficiently picturesque to deserve quotation: "Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. Among other things, here again the so called primary rights and duties are invested with a mystic significance beyond what can be assigned and explained. The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference. But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as

they can. It was good enough for Lord Coke, however, and here, as in many other cases, I am content to abide with him."

Why was it good enough for Lord Coke? Perhaps the history of the common law affords some explanation. Pollock and Maitland have shown (HIST. OF ENG. LAW (ed. 2) II, 595 ff.) that specific relief is certainly as old, probably older than the action for damages. In the time of Glanville 'damages' are a novelty. A plaintiff goes to the king's court and asks for a specific thing, of which the defendant unjustly 'deforces' him. He does not want money, compensation; he wants and gets the specific thing. Of the oldest group of actions there is not one which is an action for damages. It is true that most of the judgments in favor of plaintiffs are judgments awarding seisin of land (POLLOCK AND MAITLAND, *op. cit.*, II, 523), but the law, not content to stop at this, aimed at specific relief even in case of the breach of a contractual obligation. Putting aside the action of Debt, where the specific character of the relief may be a coincidence, some insight into the attitude of the early common law may be gained from the action of Covenant. This action was probably invented for the protection of the termor, who had no real right in the land, only the benefit of a covenant. But the relief which he obtained was not damages, as a case in 1226 (BRACON'S NOTE BOOK, pl. 1739) shows beyond question. A lessor broke his agreement (*conuencio*) that his lessee should hold the land for ten years. The court decided that the agreement must be kept and that the plaintiff should recover seisin, or, as we should say, possession, of the land. (*Et ideo consideratum est quod conuencio teneatur et quod Hugo habeat seisinam suam usque ad terminum suum \* \* \**) If this is not a judgment for the 'specific performance' of the covenant, it is difficult to say what it is. But of course a judge of the thirteenth century, as an ecclesiastic, would probably have no scruples about importing ethics into the law! Such a judgment, however, is no isolated phenomenon. Cf. HAZELTINE, *EARLY HISTORY OF ENGLISH EQUITY, ESSAYS IN LEGAL HISTORY* (ed. Vinogradoff) 269, ff.; POLLOCK AND MAITLAND, *op. cit.* II, 595. It was thoroughly in keeping with the spirit of the common law at its great formative period. Bracton probably gave expression to a truism when he wrote (fol. 413 b): "*\* \* \* Tot erunt formulae brevium quot sunt genera actionum \* \* \**" There may be as many forms of action as there are causes of action; that is to say, the remedy necessarily follows the right and the first inquiry should always be: What is the right? If there be a right, it should have an appropriate remedy. And the judges seemed convinced that the obligation of the covenantor was to perform his covenant. An action was invented to compel him so to do.

Had the common law continued its organic development, it is possible that specific relief might have been the rule rather than the exception; but the gradually encroaching power of parliament stifled its growth. The *STATUTE OF WALES* struck a heavy blow at Covenant, and the conservatism of the judges robbed that action of its possible contributions to the law of contract. The chancery did vary some formulas to suit new cases, but this power was used rarely and with great caution. The inevitable result was that the mediæval common law became a law about remedies. See Maitland in 3

HARV. L. REV. 97. In the YEAR BOOKS there is little or no talk of substantive law; it is procedure with which the judges are occupied. No longer is any such work as that of Bracton possible; for the lawyer is interested in the nature of writs, not of rights. Thus Bracton's striking statement remains true only if inverted. From the forms of action the causes of action must be deduced. There is a right only where there is a remedy. And the remedy for breach of contract is found in what was originally a tort action; naturally it sounds only in damages. It is not difficult, therefore, to see why the mediæval lawyer, constrained to think in the terms of remedies, should regard the right of the promisee as confined to damages only. There could be no obligation to perform a contract if the chancery afforded no writ to enforce such an obligation.

It may be that some such thought was present in the mind of Lord Coke. In *Bromage v. Genning* (1 Roll. R. 368; AMES, CASES IN EQUITY JURISDICTION, 38, n.) a plaintiff sought a prohibition from the King's Bench against a suit for specific performance of a lease, on the ground that the proper remedy was an action at law. Coke was clearly of opinion that a court of equity should not decree specific performance for that "this would subvert the intent of the covenantor, since he intended to have his election to pay damages or to make the lease, and they would compel him to make the lease against his will \* \* \*." It is no coincidence that the year of this decision, 1616, was the very year of the bitter controversy between Lord Coke and Lord Ellesmere, the results of which are familiar to every one. The supremacy of the court of Chancery was established, and, as Ames has well said, Lord Coke's defeat in his contest with Lord Ellesmere was matched by his failure to check the jurisdiction of the chancellor in matters of contract. Ames, *loc. cit.* Coke took a purely formal view of the obligation of the promisor. Though he may have justified it to himself by reasoning from remedy to right, he was no doubt eager to find any basis upon which to challenge the jurisdiction of Chancery. One can scarcely regard his attitude as other than that of a special pleader.

Equity has taken a substantial view. In decreeing specific performance it enforces the contractual obligation of the promisor according to the terms of his promise, so far as that is possible. But the obligation is a legal obligation and equity is acting in aid of a legal right. That the obligation is essentially legal, though not enforced specifically by a court of law, may be seen if the matter be looked at from another angle. Where there has been a repudiation of a contract or a material breach, the aggrieved party is not always driven to an action for damages, even when he may not resort to equity. If he has himself performed in whole or in part, he may elect to disregard the contract and demand restitution in value for what he has done. He has thus a "right to restitution as an alternative remedy instead of compensation in damages". WILLISTON'S WALD'S POLLOCK ON CONTRACTS, p. 334 ff. The primary right remains, however, the right to performance; the only primary obligation is the obligation to perform the contract. WOODWARD, QUASI CONTRACTS, § 260. What becomes, then, of the right to break a contract? What

has befallen the promisor's prediction that he will only pay damages if he does not perform? Specific performance in equity and restitution at law give a pertinent answer to these questions.

Undoubtedly the promisor who cannot be compelled to perform his promise does have some definite legal capacity. It seems more accurate to describe this as a power,—a power to break the contract. As Professor Hohfeld has pointed out in a spirited article (*FUNDAMENTAL LEGAL CONCEPTIONS*, 23 *YALE L. JOURN.* 16, ff.), right and duty are correlative terms. There can be no right without a duty. But the correlative of power is liability. Thus the promisor may have the ability or power to alter the legal relations growing out of the contract, to create in himself a liability. The duty of the promisor is, with due respect to Justice Holmes, to perform his promise, but by the exercise of a power he may in certain cases convert this duty into a liability. The exercise of a power in such case is wrongful but effectual; for it is of the essence of a power that it may alter, divest, or create rights.

It is submitted, therefore, that neither the history of the common law nor logic sustains the proposition that there is no legal obligation to perform a contract or, conversely, that there is a right to break a contract. To support such a notion is to hark back to the later *YEAR BOOKS* which ascribe property (*propriété*) to the trespasser, even to the thief, because, forsooth, the owner has no action against the third hand. Cf. *POLLOCK AND MAITLAND, op. cit.*, II, 156, ff. The unhappy results of this vicious process of reasoning are sufficiently striking to warn us of the danger involved in a similar mistake today.

W. T. B.

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**CONSTITUTIONALITY OF SEGREGATION ORDINANCES.**—The effort of various southern states to segregate white persons and colored ones into mutually exclusive residential districts has received a final quietus, unless the Supreme Court of the United States shall reverse itself, by the decision in *Buchanan v. Warley*, handed down November 5, 1917. The suit in this case was for specific performance of a contract to buy land. The contract expressly stipulated that the buyer, a colored man, was not to be held to his purchase unless he had "the right under the laws of the state of Kentucky and the city of Louisville to occupy said property as a residence." His objection to performance was based on the fact that an ordinance of the city forbade persons of one color "to move into and occupy as a residence" a house in any block in which a majority of houses were already occupied by persons of the other color. The ordinance expressly excluded from its operation persons who had already acquired the right of occupancy of a building or had, by previous rental, established the color of occupancy. The Supreme Court of Kentucky had held this ordinance to be valid and, because of the terms of the contract, a defense to the suit for performance. The Federal Supreme Court reversed this decision and declared the ordinance unconstitutional. The court comments upon the ordinance in some respects as though it denied rights to colored persons only, but the court's

opinion is not predicated on this, and the ordinance does in fact apply to both races alike.

The enactment would undeniably have restricted the use of property and limited the owner's normal ability to dispose of it. But the court expressly concedes that, "dominion over property springing from ownership, is not absolute and unqualified. The disposition and use of property may be controlled in the exercise of the police power in the interest of public health, convenience, or welfare." It predicates the invalidity of the ordinance upon the sole premise that the particular restraint in this case is not "due process". The court continually uses the phrase "due process" as though it were a unique quality, determinable in and of itself. The context shows, however, that it is given the customary meaning of reasonable promotion of the public welfare. For a criticism of the idea that "due process" is a unique characteristic of legislation, see 22 YALE L. JOURN. 519.

In holding the ordinance to be unreasonable the court not only reverses the decision of the state Supreme Court but is in conflict with the opinion of courts of other states. In *State v. Gurry*, 121 Md. 534, 47 L. R. A. (N. S.) 1087, 12 MICH. L. REV. 215 (1913), a similar residential segregation ordinance was held invalid, but only because it made no exception, in its operation, of rights of occupancy acquired before its enactment. As the court pointed out, it might have prevented one who was already the owner of a house, before passing of the ordinance, from afterward occupying it himself. To this extent the enactment was said to be unreasonable, but its main objective was declared to be quite within the legislative power to regulate property rights. It was acknowledged by counsel for both sides that there had been more or less friction resulting from the occupancy by colored people of houses in blocks theretofore white. "With this acknowledgment," said the court, "how can it be contended that the City Council, charged with looking to the welfare of the city, is seeking to make an unreasonable use of the police power, when it enacts a law which, in their opinion, will tend to prevent the conflict?" "\* \* \* We are of the opinion that the object sought to be accomplished by this ordinance is one which properly admits of the exercise of the police power." In *Ashland v. Coleman*, 19 VA. LAW REG. 427, decided the same year, an ordinance making it unlawful for a person of one color to occupy as a residence any house in a block already occupied by a majority of householders of the other color, and excepting rights of occupancy already acquired, was held to be reasonable and valid. In *Carey v. Atlanta*, 143 Ga. 192, L. R. A. 1915D, 684; 13 MICH. L. REV. 599 a residential segregation ordinance was declared invalid. This opinion was predicated, however, not on the ground that residential segregation had no reasonable connection with the public welfare, but on the premise that the "due process" clause precludes any restriction of an owner's right to dispose of his property. The principal case expressly repudiates this premise. In another Georgia case of this year, *Harden v. Atlanta*, Ga., 93 S. E. 401 (Aug. 1917) an ordinance almost identical with that of the principal case was upheld as constitutional. This court said, "A reasonable restraint upon alienation of property by individuals not only pervades our statute law, but is found in our state Consti-

tution." The enactment in question the court declared to be a reasonable, proper and valid restraint, saying, "If it be justifiable to separate the races in the public schools in recognition of the peril to race integrity, induced by mere race association, then we cannot see why the same public policy cannot be invoked to prohibit the black and white races from living side by side. \* \* \* An ordinance designed to accomplish this purpose will be upheld, notwithstanding that to some extent the use of property may be somewhat restricted \* \* \*." And again, "We do not think the ordinance either unreasonable or opposed to the Constitution of this state or of the United States upon the grounds stated."

Statutes segregating the races in schools and conveyances are now of admitted reasonableness and constitutionality. *Berea College v. Kentucky*, 211 U. S. 45; *Plessy v. Ferguson*, 163 U. S. 537; *Hart v. State*, 100 Md. 595. In attempting to distinguish the residential segregation law from those allowing segregation in transportation, the court is evidently actuated by a feeling that property may be less readily subjected to restriction for the public good than liberty may be. This idea appears in *Ives v. So. Buffalo R. R. Co.*, 201 N. Y. 271 and is repudiated in such cases as *Noble State Bk. v. Haskell*, 219 U. S. 104. See also, 15 MICH. L. REV. 292.

After all this direct and emphatic expression of opinion that the ordinance was reasonably necessary and conducive to public welfare it is surprising that the Supreme Court should have declared it unreasonable and, therefore, unconstitutional. When both the legislative and judicial departments of four states have explicitly declared it reasonable, one can not pretend that it is "arbitrary" or "palpably and unmistakably in excess of any reasonable exercise of authority" or even that it is "clearly" unreasonable. In declaring the ordinance void without such obvious unreasonableness, the court has exceeded the limits of its privilege as fixed by judicial declaration ever since the right of review has been exercised. *Hayburn's Case*, 2 Dallas 409; *Calder v. Bull*, 3 Dallas 385, 398; *Sinking-Fund Cases*, 99 U. S. 700, 718; *Atkin v. Kansas*, 191 U. S. 207; *Lochner v. New York*, 198 U. S. 45, 68 (dissenting opinion); *Eubank v. Richmond*, 226 U. S. 137; *Schmidinger v. Chicago*, 226 U. S. 578.

Oddly enough, the two cases which the court cites in support of its decision that the ordinance can not stand, namely, *Booth v. Illinois*, 184 U. S. 425, and *Otis v. Parker*, 187 U. S. 606, are decisions upholding the respective enactments in question on the ground that, whatever the court may think as individuals, the enactments were not so "clearly and unmistakably" unreasonable that the court could override the legislature. While it is not probable that the court will change its mind in regard to residential segregation, such reversal of opinion would not be without precedent. In *Wright v. Hart*, 182 N. Y. 330, the court held a "bulk sales" statute unconstitutional, because not reasonably conducive to public welfare, despite the fact that similar statutes had been enacted in twenty other states. Eleven years later, in *Klein v. Maravelas*, 219 N. Y. 383, the court frankly admitted that "the decision in *Wright v. Hart* is wrong," and it upheld a "very similar" statute as reasonable and constitutional.

J. B. W.

EQUITABLE REDEMPTION OF A MORTGAGE AFTER FORECLOSURE.—S was the owner of land subject to three successive mortgages held by A, B, and C respectively. B's incumbrance was for a loan of \$1,500, for which S subsequently gave B, as additional security, notes of D for an equal amount. C assigned his mortgage to B and B foreclosed it by advertisement and sale, himself purchasing at the sale subject to prior incumbrances. During the statutory period of redemption D and E paid B the \$1,500 due on their notes, which B accepted and retained. S being out of the state most of the time and ignorant of whether there had been a foreclosure sale, or, if there had, when the year of redemption expired, on several occasions applied to B for information and was always turned away with evasive and vague answers until the statutory period expired without his knowledge. Afterwards he brought his bill to redeem. The trial court found the land of sufficient value to pay all incumbrances. *Held*, that S might redeem from the foreclosure sale. Nothing is said as to redemption from the second mortgage but, as that debt had been paid, the decree presumably provided for its discharge. *Sletten v. First Nat. Bank of Carrington* (N. D. 1917), 163 N. W. 534.

This decision is rested on two grounds, the first of which is that B had defeated S's statutory right of redemption by acts of bad faith.

The statutes allowing redemption from a foreclosure sale have been held to be strictly mandatory and to be complied with literally. *Teabout v. Jaffray and Co.*, 74 Ia. 29, 7 Am. St. Rep. 465, and cases collected in note p. 469. Failure to redeem during the statutory period because of ignorance or negligence are not grounds for subsequent redemption. *Campau v. Godfrey*, 18 Mich. 27. Nor will inability to attend to business because of physical or mental debility be grounds for relief, *Wallace v. Monroe*, 22 Ill. App. 602.

On the other hand, although the law has been fully complied with, equity may allow a subsequent redemption where the statutory right is rendered nugatory by fraud, or unfair conduct. A parol agreement to extend the time beyond the statutory period has been held binding. *Southard v. Pope's Executor*, 9 B. Mon. 261. *Butt v. Butt*, 91 Ind. 305. *McMakin v. Schenck*, 98 Ind. 264. *Guinn v. Locke*, 38 Tenn. 110. These cases are not based primarily on the ground that there is an enforceable contract, but upon the ground that the promise makes it inequitable for the purchaser to retain his legal advantage. It would seem to follow that any conduct which lulls the mortgagor into security or inaction until the statutory period has expired gives him a right to redeem subsequently.

In the case of *Graffam v. Burgess*, 117 U. S. 180, land was sold on an attachment and judgment *in rem*, the judgment debtor at the time being in another state. Valuable real estate was chosen when a great amount of chattel property was available, a single piece of which would have satisfied the judgment. The property was sold for a pittance to the judgment creditor. During the year of redemption the judgment debtor lived on the premises for part of the time expending large sums in its repair, all of which the judgment creditor knew, he keeping constant watch of her movements and taking every practical precaution to keep her in ignorance until the year of redemption had expired. When the period had expired he took possession.



The Supreme Court allowed subsequent redemption on the ground of "fraud." Justice Miller, with whom concurred Justices Woods, Matthews and Gray, dissented, saying, "In addition to the sanctity which the law concedes to judicial sales, founded on well-considered reasons of policy as old as the law itself, the favor of allowing the debtor one year more to save his land, after judgment and sale under execution have fixed his rights, only adds to his obligation to exercise the right thus granted in strict accordance with its terms \* \* \* Yet after Graffam had acquired a complete legal title under judicial proceedings which were unimpeachable, the court treats the case as if the whole matter was still *in fieri* and gives further time for redemption. \* \* \* I dissent from the judgment and opinion of the court as leading to evil results, in discrediting judicial sales, and embarrassing the due and just exercise of the right of redemption, by turning it into a question of judicial discretion." Despite the vigor of the dissent, this case has never been impeached by the Supreme Court and has at least been cited once as authority without criticism. *Brophy v. Kelly*, 211 Fed. 22. See also *Hammersham v. Fairall*, 44 Ia. 462; *Palmer v. Douglas*, 107 Ill. 204.

It is to be noted that in the case of *Graffam v. Burgess*, above, the Supreme Court laid stress on the fact that the judgment debtor was a woman unskilled in business, suggesting a distinction if she were a man capable of taking care of his business, pp. 185-86; that in *Hammersham v. Fairall*, *supra*, the mortgagor was an ignorant woman and that in *Palmer v. Douglas*, *supra*, the mortgagor was an aged and illiterate man.

In the principal case the Supreme Court of North Dakota saw fit to allow redemption where the statutory requirements were fully complied with, and the mortgagor was a man requiring no exceptional protection. The fraud is summed up in this conclusion of the court: "When Sletten's obligations to the bank are compared with the security given and realized upon, and when consideration is given to the rather indefinite and somewhat evasive answers of Newberry in response to requests for information, continuing almost to the very date of the expiration of the period of redemption, it can hardly be said that the bank acted with that degree of good faith that would be manifested by one whose sole interest was to collect a debt justly owing with interest and costs."

The case goes further than prior decisions, but seems not to exceed the principles of equitable control of legal rights.

The second ground of the decision of this case was that when B purchased on the foreclosure of the third mortgage, subject to the prior mortgages, the land became the primary fund for the payment of the prior mortgages; that, as the second of these mortgages was owned by B, that mortgage merged in the equity of redemption which he had acquired by the purchase, and the second mortgage debt was discharged; and that, by subsequently accepting payment of that debt, B waived his rights as a purchaser and treated the land as a mere security for the payment of both debts.

This application of the doctrine of merger, while exceptional, seems satisfactory. That, in such a case, there is a merger, and that, where the land is amply sufficient to pay all incumbrances, the mortgage debt is thereby satis-

fied, is supported by the cases cited by the court. See also *Jackson v. Tift*, 15 Ga. 557; *Knowles v. Lawton*, 18 Ga. 476; *Northwestern Bank v. Stone*, 97 Ia. 183; *Spencer v. Harford*, 4 Wend. 381. Given the discharge of the senior mortgage by merger, a subsequent payment of the senior mortgage debt involves an unjust enrichment of the mortgagee. The natural remedy therefor would seem to be restitution to the mortgagor of the money so paid, but in this case the mortgagor seeks to recover his land on the theory of redemption. That accepting subsequent payment of a debt satisfied by foreclosure, or otherwise recognizing its continuing existence, is a waiver by the purchaser of the right to an indefeasible title and a treating of the land as security is sustained by authority. *Williams v. Bolt*, 170 Mich. 517; *Lounsberry v. Norton*, 59 Conn. 170; *Southard v. Pope's Executor*, *supra*. It would seem, by analogy, that the court is justified in holding that acceptance of payment of the debt discharged by merger, incidental to the foreclosure, has the same effect. It should be noted, however, that where a statutory right of redemption from foreclosure sale exists, the foreclosure is incomplete or inchoate during the period of redemption. It would seem to follow that during this period the purchaser in our case was entitled to receive payment on his senior mortgage and to retain such payment if redemption was ultimately made. But since no redemption was made the foreclosure may be regarded as having been perfected *ab initio*, and the doctrine of merger may be applied as if no period of redemption had intervened.

R. A. F.

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LIABILITY OF PUBLIC OFFICER FOR THE LOSS OF PRIVATE FUNDS ENTRUSTED TO HIS KEEPING.—There is much contrariety of decision concerning the liability of public officers for the loss of funds with which they have been entrusted. A recent case illustrates some of the more important phases of the law of such a situation. *People for use of Hoyt et al. v. McGrath et al.* (Ill. 1917), 117 N. E. 74. In this case the public brought an action of debt on the official bond of the clerk of court for the use of Hoyt and others. Usees had tendered into court a sum of money which the clerk took under the court's order to receive and hold it, but refused to pay it over to the usees as directed by a later order of the court, claiming the money had been received by him in his individual capacity and had been lost without his fault by the failure of the bank in which it had been deposited. Held, that as a public officer is liable as an insurer for private funds received by virtue of his office, the failure of the clerk to pay over the money in question constituted a breach of his official statutory bond.

The public officer, on the theory of the existence of a debtor-creditor relation between the public corporation and the officer with respect to the public funds in his possession, on the ground of public policy, because the loss occurs by reason of the unauthorized acts of the officer, as for example, the unauthorized deposit of public funds in a bank which later fails, or on account of the language of the bond or of the statute defining the duties of the officer, is generally held absolutely liable as an insurer for the safety of

public funds entrusted to him. *Fairchild v. Hedges*, 14 Wash. 117; *County of Mecklenburg v. Beales*, 111 Va. 691, 36 L. R. A. (N. S.) 285; *Northern Pacific Ry. Co. v. Owens*, 86 Minn. 188; *State v. Bobleter*, 83 Minn. 479; *Estate of Ramsay v. People*, 197 Ill. 572, 90 Am. St. Rep. 177. To this rule of liability exceptions have generally been made of cases where the funds have been lost without the officer's fault, solely by act of God or the public enemy, *United States v. Thomas*, 15 Wall. 337 (act of public enemy); *Thompson v. Board of Trustees*, 30 Ill. 99 (dicta); *State v. Lee*, 72 Miss. 281 (dicta); *Maloy v. Board of County Commissioners*, 10 N. Mex. 638. A few cases refuse to make even these exceptions. *Havens v. Lathene*, 75 N. Car. 505; *State v. Walsen*, 17 Colo. 170. In some states, however, the rule is established that the officer having custody of public moneys is relieved from responsibility for the loss of funds which he has exercised due care and diligence to preserve. *Livingston v. Woods*, 20 Mont. 91; *State v. Copeland*, 96 Tenn. 296; *State v. Gramm*, 7 Wyo. 329. This is clearly the minority rule.

The case noted is of especial interest because the funds in question were private, not public, funds. Some few courts have drawn a distinction in cases of this sort between public and private funds, and hold the officer liable as a bailee for hire in event of the loss of funds of the latter class. *Gartley v. People*, 28 Colo. 227; *People v. Faulkner*, 107 N. Y. 477. The reason sometimes offered for such distinction is that as the public corporation is not liable for the loss of funds where there is no negligence, so the officer, the agent of the public corporation, ought not to be. It is frequently unsafe to apply the analogy of agency in cases involving officers. Officers are frequently liable for injury or loss when the public corporation which he serves is not liable. So the reason offered is not convincing. In *People v. Faulkner*, *supra*, the reason suggested for the distinction between public and private funds is the greater degree of watchfulness and scrutiny which the owner of private funds gives to the acts of an officer who has custody of his funds. This reason is not very convincing, and it seems that the attempted distinction might well be disregarded and the officer held to the same liability for loss of private funds and for the loss of those of the public. In the great mass of cases involving liability of the officer for loss of funds without his fault the distinction has not been raised. *Shaw v. Bauman*, 34 Ohio St. 25; *Smith v. Patton*, 131 N. Car. 396; *Phillips v. Lamar*, 27 Ga. 228.

G. S.

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EXECUTION SALES AS PREFERENTIAL TRANSFERS IN BANKRUPTCY.—In the recent case of *Golden Hill Distilling Co. v. Logue*, 243 Fed. 342, the Circuit Court of Appeals for the Sixth Circuit holds that a "creditor who recovers a judgment, by consent or *in invitum*, and by execution sale collects his money within four months preceding bankruptcy, and with reasonable cause to believe [that a preference would thereby be effected] receives a voidable preference, which he must repay to the trustee."

This question is one that has vexed the bankruptcy courts ever since the Supreme Court of the United States in *Clarke v. Larremore*, 188 U. S. 486,

declined to answer it. It usually arises under circumstances as follows: C sues his insolvent debtor, B, obtains a judgment against him, issues and levies an execution, and sells under the levy. If the bankruptcy of B intervenes at this point, before the sheriff has turned over to C the proceeds of the execution sale, it is clear under the decision in *Clarke v. Larremore* that if the judgment is less than four months old it is avoided and the property affected by its lien is discharged and released from the same by the provisions of § 67f of the BANKRUPTCY ACT of 1898 which reads in part as follows: “\* \* \* all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same \* \* \*.” And it is equally clear that under these circumstances it is immaterial whether the creditor has, or has not, any information or notice as to his debtor’s insolvency or intent to prefer.

But what if the sheriff has already turned over to C the proceeds of the execution sale before B becomes bankrupt? It will make the problem simpler to assume, as before, that B’s bankruptcy ensues within four months of the entry of the judgment, though, as will be pointed out later, it may be that this requirement is not absolutely necessary. Although there was some early difference of opinion on the point, it seems to be now settled that the effect of § 67f is to strike down, not the judgment itself, but only the lien of the judgment. *REMINGTON, BANKRUPTCY*, §§ 777, 1448; *Doyle v. Heath*, 22 R. I. 213; *Pope v. Title Guaranty & Surety Co.*, 152 Wis. 611; *Rodolf v. First Nat. Bank*, 30 Okla. 631, 640. It has accordingly been held in numerous cases that under the circumstances shown above—where the lien of the judgment is no longer in question, having disappeared at the time of the execution sale—§ 67f does not have the effect of completely avoiding the judgment and all the proceedings under it; and a proceeding brought under § 67f against the creditor who has received the proceeds of the execution sale must therefore fail. *Botts v. Hammond*, 99 Fed. 916, 40 C. C. A. 179; *In re Blair*, 102 Fed. 987; *In re Knickerbocker*, 121 Fed. 1004; *Levor v. Seiter*, 74 N. Y. Supp. 499, 69 App. Div. 33; *Johnson v. Anderson*, 70 Neb. 233; *Greene v. Montana Brewing Co.*, 28 Mont. 380; *Starbuck v. Gebo*, 96 N. Y. Supp. 781, 48 Misc. 333; *Farrell v. Lockett*, 115 Tenn. 494; *In re Bailey*, 144 Fed. 214; *Nelson v. Svea Pub. Co.*, 178 Fed. 136; *In re Weitzel*, 191 Fed. 463. Two cases (*In re Breslauer*, 121 Fed. 910, and *Staunton v. Wooden*, 179 Fed. 61, 102 C. C. A. 355) are sometimes cited as holding that § 67f avoids the judgment *in toto*, but in both of these cases the execution sale took place after bankruptcy, and they are therefore not in point upon the particular question now under examination. However, in *Dreyer v. Kicklighter*, 228 Fed. 744, the District Court for the Southern District of Georgia set aside a sale under circumstances like those outlined above and held that the trustee in bankruptcy was entitled to recover the property from the purchaser at the execution sale, who had been a participant in the creditor’s fraudulent intent to secure a preference. In this case the court intimated that the purchaser would nevertheless be allowed

credit for the amount he had paid for the property at the execution sale, and that the trustee in bankruptcy could then under § 60b recover the same amount from the execution creditor to whom it had been paid by the sheriff who made the sale; this on the ground that the execution creditor had been preferred by the transaction, and had had reasonable ground to believe that a preference was to be effected.

This brings us to the question as to whether or not, under the circumstances outlined above, the trustee in bankruptcy, failing to recover under § 67f, is entitled to recover under § 60b, which reads in part as follows: "If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, \* \* \* and being within four months before the filing of the petition in bankruptcy \* \* \* the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby \* \* \* shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person." It has been held in *Galbraith v. Whitaker*, 119 Minn. 447; *Moore v. John H. Smith & Sons*, 205 Fed. 431; *Anderson v. Stayton State Bank*, 82 Ore. 357; and *Grant v. Nat. Bank of Auburn*, 232 Fed. 201, under facts similar to those under consideration, that when the creditor has reasonable cause to believe that a preference is being effected the trustee in bankruptcy may recover from him the value of the property thus sold on execution. The same conclusion is reached in the principal case.

The cases which come to this conclusion, however, do not agree as to the grounds for their decisions. In *Moore v. John H. Smith & Sons*, and in *Anderson v. Stayton State Bank* it seems to have been the view of the court that it was the judgment that was made voidable by § 60b and that was avoided by the suit of the trustee. The Minnesota court in *Galbraith v. Whitaker*, and the Circuit Court of Appeals in the principal case seem to take the view that either the execution sale or else the payment of the proceeds to the creditor amounted to a transfer under § 60b and that it was this transfer that was voidable and that was set aside by the trustee's suit. And in *Grant v. Nat. Bank of Auburn*, (which, by the way, is the only one of these four cases to be cited in the principal case), Judge Ray intimates that it is the preference that is voidable by the trustee. This diversity of opinion is natural, for, as stated in the principal case, "it must be conceded that there are, in sections 60a and 60b, no provisions which in terms, reach the proceeds of a satisfied judgment."

What is it, then, that can be set aside by the trustee under the power given him under § 60b? It may be: (1) the judgment; (2) the transfer arising from the execution sale or the payment of its proceeds, or (3) the preference, which would probably include both (1) and (2).

There are obvious objections to the view that it is the judgment that is to be avoided. In the first place, under the circumstances we are considering, the judgment has been satisfied and is no longer in existence, as is pointed

our clearly in the cases cited above as holding that § 67f does not apply to this situation. Moreover, the "entry of judgment" itself does not always "operate as a preference," though that is the language of the statute. Frequently something in addition to the entry of the judgment, as docketing, recording, or levy, is required to make the judgment operate as a preference by enabling the judgment creditor "to obtain a greater percentage of his debt than any other" creditor of the same class. It is difficult, therefore, to see how, under the circumstances before us, the courts are justified by § 60b in allowing the trustee to recover from the creditor on the ground that the judgment is voidable.

Is the execution sale—as suggested by the Minnesota court—or the payment of its proceeds—as held in the principal case—such a "transfer" as is contemplated by § 60b? This construction is of course based on the broad definition of "transfer" in § 1(25). Though, as the court admits in the principal case, the applicability of § 60b is not clear or certain, at least this construction has some advantages of expediency over the view that it is the *judgment* that is avoided by § 60b. If we have a transfer, it undoubtedly operates as a preference, as required by the section, while, as has been seen, the judgment alone does not necessarily have this effect. Moreover, it gives less opportunity for the creditor to defeat the trustee's suit on the ground that he did not have reasonable ground to believe that a preference was to be effected. A creditor might obtain a judgment without having such reasonable ground, and yet have it at the time of the execution sale or of the turning over of the proceeds. If the "judgment" view of § 60b is taken, of course, it is his knowledge at the time of the entry of the judgment that is material; if the "transfer" view is taken it is his knowledge at the later date of the execution sale or of the turning over of the proceeds. In this aspect of the case, it is clear that the holding in the principal case—that the turning over of the proceeds makes the "transfer"—is preferable to the Minnesota court's holding that it is the execution sale that makes the "transfer," simply because it refers the test of "reasonable ground to believe" to a later time.

Judge Ray's suggestion that it is the "preference" that is voidable is perhaps open to the objection that it makes less certain the exact time that is to be taken for applying the test of "reasonable cause to believe." Otherwise it possesses many of the advantages of the view taken in the principal case, and is free from one objection that may be urged against the latter view.

In the principal case the date of the entry of the judgment is not given. It is likely that it was within four months before the debtor's bankruptcy, but that fact does not clearly appear; and if we are to accept the court's statement that the turning over of the proceeds is a "transfer," of course the preference consists in the transfer, not in the judgment, and the date of the judgment becomes immaterial, the critical date being that on which the proceeds of the execution sale were turned over to the creditor. But it has repeatedly been held that after four months from the date of the filing of a judgment (perhaps more accurately the date on which it becomes a lien) the judgment is immune from attack on the ground of preference, and the judgment creditor's preference then becomes a non-voidable preference. This

was distinctly held in *Colston v. Austin Run Mining Co.*, 194 Fed. 929, 114 C. C. A. 565, and in *In re Deer Creek etc. Co.*, 205 Fed. 205 where the preferences were being considered as acts of bankruptcy; and it seems to have been the view of the Supreme Court in *Citizens Banking Co. v. Ravenna Nat. Bank*, 234 U. S., 360, 367-8, where the same result is admitted and approved. The cases are collected in REMINGTON, BANKRUPTCY, §§ 143, 1451. If the principal case is to be followed out logically it must be held that a transfer takes place when the proceeds of the execution are paid over to the creditor. If the debtor is then insolvent and the transaction results in a preference, an act of bankruptcy has been committed; if the creditor then has reasonable cause to believe that a preference will result, the trustee can recover the preference from him. This construction of § 60b practically nullifies the requirement of the section as to judgments, and upsets the generally accepted view as to the impregnability of a judgment more than four months old. To be sure, such a judgment might be impregnable as long as the judgment creditor did nothing to make it fruitful by sale; as soon as he did this, however, he would run the risk of having a bankruptcy proceeding begun, and of having to pay back to the trustee any proceeds received from the sale.

If, however, the judgment in the principal case was obtained within four months of the bankruptcy the decision of course applies only to cases where such was the fact. And as thus restricted in effect the decision certainly reaches a desirable result in perhaps the most desirable way. Inasmuch as the court admits that the words of the statute are "far from apt" and do not "in terms, reach the proceeds of a satisfied judgment" and as the court calls to its support §§ 3a (3), 60a, 60b, 67c and 67f, as well as the 1910 amendment to § 60b, in concluding that the general purpose of the act can only be effectuated by the decision arrived at, it seems pretty clear that the suggested restriction on the rule can be supported about as well as the rule itself. It is to be hoped that the Supreme Court will uphold the desirable result reached in the principal case.

E. H.